Exhibit C

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

PETITION OF	)	
	)	
STARPOWER COMMUNICATIONS, LLC	)	
	)	Case No. PUC990023
For Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc. and Directing GTE to pay reciprocal compensation for the termination of local calls to Internet service providers.	)	

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC, IN RESPONSE TO THE MEMORANDUM OF LAW FILED BY GTE SOUTH, INC.

Level 3 Communications, LLC ("Level 3"), by its undersigned counsel, and pursuant to the June 22, 1999 Order of the Commission, hereby files its Comments addressing the arguments made by GTE South, Inc. ("GTE") in its Memorandum of Law filed in this matter. Level 3, through a subsidiary, is a certified competitive local exchange carrier in Virginia. Level 3 and its predecessors have been in the telecommunications business since 1988. Level 3 is interconnected with Bell Atlantic in Virginia and recently entered into an interconnection agreement with GTE for its Virginia operations. Level 3 intends to provide a full range of information and communication services over the first end-to-end network designed and built specifically for Internet Protocol (IP) based services. Level 3 expects to offer services over interconnected local and long distance networks it is building across the United States and internationally.

ARGUMENT

GTE's effort to avoid paying compensation to its competitors underscores its Incumbent Carrier mindset.[1] GTE never denies that CLECs perform services for GTE when they terminate calls from GTE end users to CLEC end users, including Internet service providers ("ISPs"), and that CLEC's incur costs associated with such service. GTE never denies that as a result of those services, GTE avoids costs it would otherwise incur. GTE does not deny that the ability of its end users to reach all end users, including those of its competitors, is not only essential, but also required by law. GTE instead argues that the Commission should ignore, or change, its earlier decision in a proceeding brought by Cox Virginia Telecom[2] by finding that traffic originated by GTE's customers, which are terminated by ISPs served by CLECs are not eligible for reciprocal compensation." GTE is simply wrong. Nothing in the FCC's recent ruling[3] requires that the Commission to ignore, or to depart from its earlier decision on this issue. That result is clear from a reading of the *Declaratory Ruling*. In fact the FCC went to extraordinary lengths to make clear that nothing it did was in any way intended to change any of the 30 state and five federal

---

[1] GTE Memo at 7 - 8. This is also evident in GTE's irrelevant attack on market entrants who, by necessity, must initially address only a portion of GTE's materially larger customer base. See, GTE Memo at 13 - 15.

[2] *Petition of Cox Virginia Telecom, Inc. for enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet Service Providers*, Case No. PUC-970069, Final Order (Oct. 24, 1997)(the "*Cox Decision*").

[3] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 96-98, *In the Matter of Implementation of the Local Competitive Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 96-98, 99-68 (rel. Feb. 26, 1999) ("*Declaratory Ruling*").

court rulings finding that, for purposes of reciprocal compensation, calls to ISPs are treated as local calls.[4]

A. The FCC's *Declaratory Ruling* Is Consistent With the Commission's *Cox Decision*

GTE contends that the traffic at issue–calls originating with GTE customers and terminating at ISPs who are served by CLECs are interstate and therefore not subject to the reciprocal compensation provisions of the many interconnection agreements it signed with CLECs. GTE further contends that the FCC's jurisdictional determination essentially invalidated this Commission's earlier *Cox Decision*. Alternatively, GTE contends that the *Cox Decision* does not apply to the circumstances of this case because it involved different parties and a different contract. GTE misses the point. To be sure, the *Cox Decision* involved different parties and a different contract, but the differences are not material to this dispute. The Commission resolved the legal issue presented by Starpower's Complaint in the Cox proceeding and nothing about the facts upon which the Commission based its decision have changed.

GTE's argument largely consists of its reliance on the jurisdictional determination made by the FCC that the calls are mixed traffic that are "largely interstate," subject at least in part to the FCC's jurisdiction. GTE attempts to twist the FCC's analysis for determining the jurisdictional nature of calls to ISPs into a justification to overturn the Commission's earlier determination that the calls shall be treated as local calls for purposes of reciprocal compensation. No matter what type of spin GTE tries to put on the jurisdictional analysis,

---

[4] *Declaratory Ruling* at ¶¶ 1, 24.

nothing in the *Declaratory Ruling* requires the Commission to change its earlier determination. In fact, the FCC expressly left this determination to the states.

Contrary to GTE's assertion that the jurisdictional issue determines the need to modify the *Cox Decision*, the FCC in fact noted that "our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation suggest that such compensation is due for that traffic."[5]

The FCC in fact spoke directly to the issue of how a state commission might determine the intent of the parties, "including the negotiation of the agreements in the context of the Commission's long standing policy to treat this traffic as local."[6] The FCC identified a variety of factors which might be used by a commission in its effort to ascertain the intent of the parties. A number of those were contained in the record of the earlier *Cox* proceeding. These include: (1) local exchange carriers charge their customers local rates for calls to ISPs; (2) there are no exception for calls to ISPs in the way interconnection agreements define local calls; (3) revenues from these calls are treated as local for separation purposes; (4) there is no evidence that the parties made any effort to separate these calls for compensation purposes.

The FCC also noted that state commissions are the arbiters of what factors are relevant for determining the parties' intentions. Thus, the Commission's finding that ISPs have local telephone numbers and that the calls are dialed as any other local calls were and are appropriate factors for the Commission to consider in interpreting the intent of the parties. The Commission

---

[5] *Declaratory Ruling* at ¶ 25. The FCC also specifically stated that the jurisdictional determination is not dispositive of the interconnection disputes before state commissions. *Id.* at 20.

[6] *Declaratory Ruling* at ¶ 24.

was quite clear that the determination it was making was for purposes of classifying the traffic in the Agreement.[7] It did not need to and was not making a jurisdictional decision.

GTE's excursion into jurisdictional analysis in order to determine the issue of whether reciprocal compensation was due for ISP-bound calls was anticipated and addressed by the FCC. The FCC stated that its determination that a portion of calls to ISPs are interstate is not "dispositive of interconnection disputes currently before the state commissions."[8] The FCC also spoke to the impact of its jurisdictional decision on state commission decisions – the FCC stated that "[n]othing in this Declaratory Ruling, therefore, should be construed to question any determinations a state commission has made. . . that the parties agreed to treat ISP bound traffic as local traffic under existing interconnection agreements."[9]

B. Every State Decision Issued Since the Declaratory Ruling Directly Involving GTE Has Endorsed The Determination This Commission Reached In Cox–All Have Concluded that Reciprocal Compensation Is Owed For ISP-Bound Traffic.

Since the FCC released the Declaratory Ruling in February, 1999, four state commissions have issued decisions on the issue of reciprocal compensation for ISP-bound traffic in cases directly involving GTE. In each and every one of those cases, the state commissions rejected the very same arguments that GTE makes here and concluded, unanimously, that calls to ISPs are to be treated as local for purposes of reciprocal compensation.[10] Excerpts from some of the

---

7 *Cox Decision* at 2.

8 *Declaratory Ruling* at ¶ 24.

9 *Id.*

10 *In the matter of the Petition of Electric Lightwave, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Incorporated, Pursuant to the Telecommunications Act of 1996*, Arb 91, Order No. 99-218, Commission Decision (Or. P.U.C., Mar. 17, 1999); *Petition of*

decisions confirm that this Commission reached the correct result in the *Cox Decision* and it should reach the same result in this case.

For example, an arbitrator's decision in Washington involving GTE and Electric Lightwave[11], sheds light on the issue presented here of whether reciprocal compensation should be paid for ISP-bound traffic given that enhanced service providers are exempt from interstate access charges. The arbitrator stated that:

> LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network and the terminating LEC does not directly receive any revenue from the customer who originates the call. Even though local-interstate traffic is not addressed by section 251(b)(5) of the Telecom Act, the FCC's policy of treating ISP-bound traffic as local for purposes of interstate access charges *leads to the equitable conclusion that it also should be treated as local for purposes of reciprocal compensation charges.* The only other alternative would be to apply interstate terminating access charges.[12]

The Washington Commission also addressed and resolved the issue in a contract enforcement proceeding between WorldCom and GTE. Adopting the same reasoning as the arbitrator quoted above, the Washington Commission stated:

GTE Hawaiian Telephone Company, Inc. for a Declaratory Order that Traffic to Internet Service Providers is Interstate and Not Subject to Transport and Termination Compensation, Docket No. 99-0067, Decision and Order No. 16975 (Ha. P.U.C., May 6, 1999); *WorldCom, Inc. v. GTE Northwest Inc.*, Third Supplemental Order Granting WorldCom's Complaint, Granting Staff's Penalty Proposal; and Denying GTE's Counterclaim, Docket No. UT-980338 (Wa. U.T.C., May 12, 1999); *Request for Arbitration Concerning Complaint of Intermedia Communications, Inc. Against GTE Florida Incorporated for Breach of Terms of Florida Partial Interconnection Agreement*, Docket No. 98-986-TP, Decision (Fla. P.S.C., July 6, 1999)(no written opinion issued yet).

[11] *In the Matter of the Petition for Arbitration of an Interconnection Agreement between Electric Lightwave, Inc. and GTE Northwest Incorporated Pursuant to 47 USC Section 252*, Docket No. UT-980370, Arbitrator's Report and Decision (W.U.T.C., March 22, 1999).

[12] *Id.* at 10 - 11 (emphasis added).

> We agree with WorldCom's analysis that, taking into consideration the compensation framework established in the Act, the termination of traffic carried by two carriers not otherwise subject to access charges is subject to reciprocal compensation.[13]

Similarly, when faced with a request for an order from GTE determining the scope of its reciprocal compensation obligations in light of the FCC's *Declaratory Ruling*, the Public Utilities Commission of Hawaii rejected GTE's interpretation of that *Declaratory Ruling*, stating in part as follows:

> our reading of the FCC Order leads us to conclusions that are contrary to GTE Hawaiian Tel's request. In particular, we conclude that: (1) the FCC did not intend to interfere with our findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic; (2) our prior Docket No. 7702 rulings on ISP-bound traffic are not in conflict with the FCC Order; (3) parties that have agreed to include ISP-bound traffic within their interconnection agreements are bound by those agreements, as interpreted and enforced by state commissions; and (4) where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, we nonetheless may determine in arbitration proceedings at this point that reciprocal compensation should be paid for such traffic.[14]

Moreover, the Hawaii P.U.C.'s assessment that its prior ruling on reciprocal compensation would not conflict with federal law or FCC rules received recent support from the United States Court of Appeals for the Seventh Circuit.[15] In affirming the underlying decisions of the District Court for the Northern District of Illinois and the Illinois Commerce Commission, the

---

[13] *WorldCom, Inc. f/k/a MFS Intelenet of Washington, Inc. v. GTE Northwest Inc.*, Third Supplemental Order Granting WorldCom's Complaint, Granting Staff's Penalty Proposal; and Denying GTE's Counterclaim, Docket No. UT-980338 at 23 (Wa. U.T.C., May 12, 1999).

[14] *Petition of GTE Hawaiian Telephone Company Incorporated, supra*, at 3 (footnotes and citations omitted).

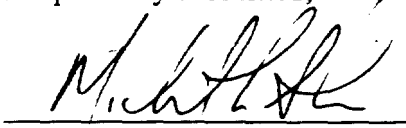
[15] *Illinois Bell Telephone Co. d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., et al.*, Case No. 98-3150, 1999 WL 436474, (7th Cir., June 18, 1999).

Seventh Circuit concluded that just because "the Act does not require reciprocal compensation for calls to ISPs is not to say that it prohibits it. . . . The Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out."[16]

CONCLUSION

The Commission's *Cox Decision* was correct when it was issued on October 24, 1997, and it is correct now. The FCC made it clear that its *Declaratory Ruling* was not intended to affect state commission decisions such as the one previously announced by this Commission. There is no basis for vacating or ignoring the underlying legal principle announced in the *Cox Decision* and it applies with equal force here today. In the interests of promoting competition in the local exchange market in Virginia, Level 3 respectfully asks the Commission to find in favor of Starpower Communications, LLC on its complaint against GTE and to order GTE to pay reciprocal compensation for all local calls, including calls to ISPs.

Respectfully submitted,



William P. Hunt III
LEVEL 3 COMMUNICATIONS, INC.
1450 Infinite Drive
Louisville, CO 80027
(303) 926-3555 (telephone)
(303) 926-3467 (facsimile)

Richard M. Rindler
Michael L. Shor (Va. Bar No. 28478)
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (telephone)
(202) 424-7645 (fax)

Counsel for Level 3 Communications, Inc.

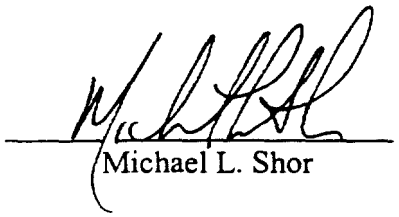
Dated: July 19, 1999

290486.1

[16] 1994 WL 436474 at 5, slip. op. at 7.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 1999, a true and correct copy of the foregoing Comments of Level 3 Communications, Inc. In Response To GTE South, Inc. was served by first class mail, postage pre-paid upon the parties identified on the attached list:



Michael L. Shor

290317.1

hard D. Gary
regory M. Romano
nton & Williams
E. Byrd Street
ichmond, VA 23219

Kimberly A. Newman
Hunton & Williams
1900 K Street, N.W.
Suite 1200
Washington, D.C. 20036

ouis R. Monacell, Esquire
bert M. Gillespie, Esquire
ristian & Barton, L.L.P.
)9 East Main Street, Suite 1200
:hmond, VA 23219-3095

Eric M. Page, Esquire
LeClair Ryan
4201 Dominion Boulevard, Suite 200
Glen Allen, VA 23060

ın F. Dudley
enior Assistant Attorney General
vison of Consumer Counsel
fice of the Attorney General
00 East Main Street, 2nd Floor
:hmond, VA 23219

State Corporation Commission
Office of the General Counsel
Tyler Building - 10th Floor
Richmond, VA 23219

720.1

Exhibit D

7/16/99

BEFORE THE
STATE CORPORATION COMMISSION
COMMONWEALTH OF VIRGINIA

PETITION OF

STARPOWER COMMUNICATIONS, LLC — CASE NO. PUC990023

For Declaratory Judgment
Interpreting Interconnection
Agreement with GTE South, Inc.

and

PETITION OF

COX VIRGINIA TELECOM, INC.
v. — CASE NO. PUC990046
GTE SOUTH, INC.

For enforcement of interconnection
agreement for reciprocal compensation
for the termination of local calls
to Internet Service Providers

COMMENTS OF MCI WORLDCOM, INC.

MFS Intelenet Service of Virginia, Inc. ("MFS") and its parent, MCI WorldCom, Inc., (together "MCI WorldCom"), respectfully submit these Comments of MCI WorldCom pursuant to the State Corporation Commission's ("Commission's") Order making MFS a party to the Starpower Communications, LLC ("Starpower") proceeding[1] and inviting interested parties to file comments in both the Cox Virginia Telecom, Inc. ("Cox") and Starpower proceedings.

[1] Starpower has opted into the MFS/GTE Interconnection Agreement, pursuant to §525(i) of the Telecommunications Act of 1996 ("the 1996 Act"). Therefore, the intent of the parties to the MFS/GTE Interconnection Agreement is of particular significance.

INTRODUCTION

The Petitions of Starpower and Cox should be granted. The issue of reciprocal compensation payments for traffic terminated to Internet Services Providers has been litigated and re-litigated, both in Virginia and nationally. GTE's basic argument--that the Federal Communication Commission's ("FCC's") February 26, 1999 Ruling declares this traffic interstate and not subject to reciprocal compensation obligations--has been rejected by thirteen states. Each of these states has recognized that under the FCC's Order it possesses the jurisdiction to direct the payment of reciprocal compensation for ISP-bound traffic. Moreover, this Commission's 1997 decision directing Bell Atlantic to pay reciprocal compensation to Cox on ISP traffic is as valid today as it was when first issued. The same conclusion is applicable to the Interconnection Agreement between MFS and GTE because the regulatory and legal context in which the Agreement was negotiated treated ISP-bound traffic as local traffic for which reciprocal compensation obligations attached. GTE should be required to pay for this traffic pursuant to the interconnection agreement signed between GTE and the Petitioners.

Contrary to assertions made in GTE's Memorandum of Law, the February 26, 1999 Declaratory Ruling of the FCC[2] does not prohibit the payment of reciprocal compensation on traffic terminated to Internet Service Providers. Quite the contrary, the FCC, ***in explicit directives that GTE tellingly fails to acknowledge***, specifically affirmed prior state commission decisions on this issue. Specifically, the FCC "found no reason to interfere with state commission findings as to whether reciprocal compensation

[2] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68 (rel. Feb. 26, 1999) ("February 26 Ruling" or "FCC Ruling"). (A copy of the FCC's Ruling is attached as Ex. 1.)

provisions of interconnection agreements apply to ISP-bound traffic [pending the FCC's proposed rulemaking on the issue]." FCC Ruling at 21. Consequently, this Commission's determination in the Cox proceeding is as sound today as it was when it was issued, and GTE's position should be rejected.

I. FCC's February 26, 1999 Ruling

On February 26, 1999, the FCC issued a "Declaratory Ruling" in its Local Competition Docket. (Ex. 1.) The purpose of the Ruling was to address questions raised by a number of parties concerning the jurisdictional nature of calls to ISPs and the applicability of the reciprocal compensation obligations imposed by section 251(b)(5) of the 1996 Act to calls to ISPs. FCC Ruling at 1.

The FCC held that parties "*should be bound by their existing interconnection agreements*, as interpreted and enforced by state commissions," including those that require payment of reciprocal compensation for calls to ISPs. Id. (emphasis added). The FCC specifically confirmed the unanimous decisions of the state commissions that have addressed this subject, holding that there is "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic...." Id. at 21.

The FCC then concluded that calls to ISPs are "jurisdictionally mixed" and that a substantial portion of dial-up ISP-bound traffic is interstate for jurisdictional purposes. Id. at 1, 10-20. However, the FCC noted that this conclusion was a new pronouncement, and held that parties are bound by their commitments in interconnection agreements to make calls to ISPs subject to reciprocal compensation obligations. Id. at 1, 22-24.

The FCC set forth a series of factors that state commissions could use to determine whether the parties had reached such an agreement requiring the payment of reciprocal compensation on ISP-bound traffic. Id. at 24. The FCC also specifically found that even where parties did not reach agreement on the issue, state commissions have authority to determine "that reciprocal compensation should be paid for this [ISP-bound] traffic." Id. at 25. The FCC acknowledged that "our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." Id.

Finally, the FCC instituted a rulemaking proceeding to consider whether a new inter-carrier compensation scheme should be adopted prospectively for calls to ISPs. Id. at 28-50.

II. The Commission's October 24, 1997 Order In Case No. PUC970069

The Commission ruled in Case No. PUC 970069 that calls to ISPs constitute local traffic under the terms of the Interconnection Agreement between Cox and Bell Atlantic-Virginia, Inc. ("BA-VA"), and that reciprocal compensation was owed for these calls. Nothing in the FCC's February 26, 1999 Ruling calls this conclusion into question. Moreover, the FCC's Ruling makes it clear that a similar decision should be rendered with respect to the MFS/GTE Interconnection Agreement.

ARGUMENT

GTE's claim that the FCC's February 26 Ruling prohibits reciprocal compensation payments on ISP calls is simply wrong. Contrary to GTE's claim, the FCC's February 26 Ruling provides that the states are free to construe interconnection agreements as requiring the payment of reciprocal compensation on calls to ISP's. The FCC's Ruling expressly requires carriers like GTE to comply with state commission decisions interpreting interconnection agreements to require that reciprocal compensation be paid for calls to ISPs. (See Section II below.)

I. The FCC's Decision Specifically Affirms The Right of State Commissions To Construe Interconnection Agreements.

The FCC noted that state commissions across the country had, without exception, determined that carriers were entitled to compensation for calls to the ISPs to which they provided local service. Id. at 1, 21. The FCC took great pains to affirm those prior decisions. Specifically, in the first paragraph of the Ruling, the FCC stated:

> In the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions.

Id. at 1 (emphasis added). Likewise, the FCC later stated:

> We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.

Id. at 21.

The FCC expressly rejected the claim of incumbent carriers like GTE that only the FCC has jurisdiction over this issue and that the 1996 Act and FCC rules precluded state commissions from interpreting interconnection agreements to require reciprocal compensation for ISP-bound traffic. Id. at 25. The FCC stated:

> In the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but . . . to decide whether . . . to require the payment of reciprocal compensation . . . . A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic.

Id. at 26 (emphasis added).

It is therefore indisputable that the FCC's conclusion that state commission determinations regarding compensation for ISP traffic are valid and binding was a central tenet of the February 26 Ruling. To accentuate the importance of this aspect of the Ruling, the FCC emphasized the validity of state commission determinations in its press release accompanying the Ruling. The FCC stated: "the Commission today concluded that carriers are bound by their existing interconnection agreements, as interpreted by state commissions, and thus are subject to reciprocal compensation obligations to the extent provided by such agreements or as determined by state commissions." (FCC Press Release, attached as Ex. 2, at 1-2.) The FCC confirmed that carriers are bound by the

state commissions' interpretation of their interconnection agreements yet again in a "Fact Sheet" distributed with the Ruling. The FCC stated:

> The Declaratory Ruling concludes that carriers are bound by their existing interconnection agreements, as interpreted by state commissions, and thus are subject to reciprocal compensation obligations to the extent provided by such agreements or as determined by state commissions.

(FCC Fact Sheet, attached as Ex. 3, at 1.)

Even before the FCC issued the February 26 ruling, it had announced that it would not disturb state commission determinations construing existing interconnection agreements. For example, FCC Chairman William Kennard emphasized in a November 11, 1998 speech to state public utility regulators that the FCC's then-forthcoming treatment of reciprocal compensation issues would respect existing state commission decisions. Chairman Kennard stated:

> I know that a large number of states have already weighed in on the issue of reciprocal compensation between local carriers handling Internet traffic. I believe that those states have been right to decide that issue when it has been presented to them and I do not believe it is the role of the FCC to interfere with those state decisions in any way.
>
> Parties should be held to the terms of their agreements, and if a state has decided that a reciprocal compensation agreement provides for the payment of compensation for Internet-bound traffic, then that agreement and that decision by the state must be honored.

FCC Chairman William E. Kennard, Remarks to the National Association of Regulatory Utility Commissioners (Nov. 11, 1998) (attached as Ex. 4).

The terms of the Ruling and the FCC's prior and subsequent statements thus belie GTE's claim that the Ruling relieves it of its obligation to pay reciprocal compensation. Although GTE prefers to cite only the FCC's jurisdictional analysis, the FCC took great pains to make clear that carriers like GTE cannot side-step the binding decisions of state commissions enforcing interconnection agreements.

A. The FCC's Conclusion that Calls to ISPs Are "Jurisdictionally Interstate" Has No Bearing on the Issues Presented Here.

Notwithstanding the FCC's clear directives set forth above, GTE claims that the Commission cannot assert jurisdiction over the Starpower and Cox Petitions because of the FCC's analysis of the jurisdictional nature of dial-up calls to ISPs. GTE argues that the FCC found that a call to an ISP is a single *interstate* call that is being made by an end user to an ISP and therefore cannot constitute local traffic subject to reciprocal compensation obligations. This claim, of course, fails because it contravenes the FCC's statements set forth above. The claim is also belied by the FCC's explicit limitation of its jurisdictional analysis. The FCC emphasized in the Ruling that nothing in its jurisdictional analysis affected its determination that carriers are bound to state commission interpretations of interconnection agreements. FCC Ruling at 20. Rather, the FCC re-confirmed that its policy has been -- and continues to be -- to treat calls to ISPs as local calls subject to state commission regulation.

The FCC made it clear that its jurisdictional analysis of calls to ISPs does not invalidate the existing regulatory regime under which calls to ISPs are treated as local calls subject to regulation by state commissions -- including for purposes of

compensation. The FCC re-confirmed that calls to ISPs are not subject to interstate access charges, but remain subject to regulation by state commissions. Id. at 19-21. The FCC stated: "[T]he Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local." Id. at 5. The FCC reiterated this point later, stating: "We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes and, hence, to treat ISP-bound traffic as local, does not affect the Commission's ability to exercise jurisdiction over such traffic." Id. at 16 (emphasis added).

In short, though the FCC asserted jurisdiction over calls to ISPs, it acknowledged that it "has treated ISP-bound traffic as though it were local." Id. at 5. Accordingly, the FCC left to state commissions the continued responsibility of determining whether carriers ought to pay compensation to each other for completing calls to ISPs. Id. at 23-27.

Contrary to assertions made in GTE's Memorandum of Law, the FCC's Ruling confirms that the Commission can and should require GTE to make reciprocal compensation payments on ISP traffic under the Cox and Starpower interconnection agreements.

Although GTE argues to the contrary, the FCC's Ruling explicitly affirms the Commission's right to require the payment of reciprocal compensation on ISP traffic. GTE has been quite selective in its description of the FCC's Ruling.

II. The MFS/GTE Interconnection Agreement Requires Reciprocal Compensation for Calls to ISPs.

A. ISP-Bound Traffic is Local Traffic Under the Terms of the Interconnection Agreement.

The MFS/GTE Interconnection Agreement provides that "The Parties shall reciprocally terminate POTS originating on each others' networks ...." MFS/GTE Interim Virginia Co-Carrier Agreement, Section VI.A., September 5, 1996 (revised), filed June 6, 1997. POTS is a defined term in Section FF of the Agreement. The Agreement defines "Plain Old Telephone Service Traffic" or "POTS traffic" to include "local traffic (including EAS) as defined in GTE's tariff." Id. Section II.FF. Finally, the Interconnection Agreement between MFS and GTE provides that "For the termination of local traffic (including EAS), the Parties agree to an equal, identical and reciprocal rate of $.009 per minute." Id. Section VI.B.1.

Thus, under Section VI.B of the Agreement, 'local traffic' is identical to local traffic in GTE's tariff. As the Commission is aware, GTE has always provided calls to ISPs through this tariff and has always treated these calls as local for billing, routing, numbering, etc. purposes, and still does. Thus, calls to ISPs are local calls under the Agreement because these calls are local calls under GTE's local tariff.

B. ISP bound traffic was considered local traffic at the time that the interconnection agreement was negotiated.

The FCC has provided guidance that the Commission should employ in construing the GTE/MFS Agreement. In setting up guidance for state commissions, the FCC cited a number of factors which a state commission should take account of in construing Interconnection Agreements. Under well-established principles of contract construction, the parties' intent is determined with respect to the time of contracting, not

at some subsequent date. Where states have not yet made a determination of intent, the FCC noted that state commissions could consider "the negotiation of the agreements in the context of [the FCC's] longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements." Id. at 24. More specifically, the FCC stated that state commissions could consider:

> such factors as whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic.

Id. at 24. The FCC also noted that "[t]hese factors are illustrative only; state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties intentions." Id. A straightforward application of these factors leads to the inescapable conclusion that MFS and GTE intended that reciprocal compensation payment obligations would apply to Internet traffic.

Calls to ISPs within the local service area are indistinguishable from any other local call. For example, ISPs have a regular seven-digit local number; ISPs purchase telephone service from GTE pursuant to regular local business tariffs; GTE bills its customers for local calls when they call ISPs, GTE treats calls to ISPs as local calls in the

jurisdictional separations filed with the FCC; calls to ISPs travel over the same trunks as local calls; GTE cannot readily distinguish calls to ISPs from other local calls; and calls to ISPs are identical to other local calls in all other technical respects.

C. The legal and regulatory context within which the interconnection agreement was negotiated requires that ISP-bound traffic be considered local traffic.

GTE contends that this treatment of ISP traffic as local is irrelevant because this treatment "is required of GTE by law." Memorandum of Law at 7-8. The fact that ISP traffic was treated as local at the time the MFS/GTE contract was executed provides the legal and regulatory context in which the parties negotiated. The Interconnection Agreement must be construed in this context, which both parties were aware of. When the parties agreed that "For the termination of local traffic (including EAS), the parties agree to an equal, identical and reciprocal rate of $.009 per minute" they understood the phrase 'local traffic' to include all traffic which was classified as local given prevailing legal, regulatory, and industry usage at that time. The fact that GTE was required by law to treat ISP traffic as local confirms that the parties intended ISP traffic to be considered local traffic for reciprocal compensation purposes.

Other aspects of the regulatory environment in which the parties conducted negotiations also confirm that the parties intended to have such traffic compensated at the local rate. Since 1983 ISPs were treated as end users and not carriers. Thus, at the time GTE and MFS contracted, all parties would have considered that a call to an ISP *terminated* at the ISP. The FCC itself acknowledged its "long standing policy of treating this traffic as local" and noted that this policy when applied in "the context of reciprocal

compensation suggests that such compensation is due for that traffic." FCC Ruling at 24, 25.

In short, at the time of contracting, all the evidence demonstrated that the parties intended to treat ISP-bound traffic as local. The FCC has noted that state commissions should consider "the negotiation of the agreements in the context of [the FCC's] longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements." Id. at 24. It is clear that when MFS and GTE negotiated their Interconnection Agreement in 1996 they were aware of the FCC's longstanding policy of treating ISP traffic as local.

D. The GTE/MFS contract does not specifically exclude ISP traffic from the agreement's reciprocal compensation obligations.

GTE argues that ISP traffic is not local traffic because the Interconnection Agreement does not expressly include ISP traffic as local.[3] Memorandum of Law at 8. This argument misses the point--there was no reason to expressly include ISP traffic in the definition of 'local traffic' because calls to ISP's were indisputably 'local calls' given the industry usage, and the prevailing legal and regulatory context in which the Interconnection Agreement was executed. In this legal and regulatory context, ISP traffic would have to have been expressly excluded from the reciprocal compensation provisions of the Agreement in order not to be covered.[4]

---

[3] GTE's logic suggests that any traffic not specifically included should be excluded from the Agreement's reciprocal compensation obligation. For example, a call from a residential end user customer of GTE to a pizza parlor that is an MFS customer would be traffic excluded from the reciprocal compensation obligation of the interconnection agreement since that particular call is not specifically included as eligible for reciprocal compensation according to GTE's stated interpretation of the agreement. Under GTE's proposed interpretation, no traffic is considered local and eligible for reciprocal compensation. This could hardly have been the intent of the parties.

[4] MCI WorldCom is aware of recently filed interconnection agreements that do explicitly exclude ISP-bound traffic from the Agreement's reciprocal compensation obligations. For example, the interconnection

The absence of any explicit language excluding Internet calls from the reciprocal compensation obligations of the Agreement indicates that there was a meeting of the minds between the parties in 1996 that this traffic was no different than any other local traffic. This construction is buttressed by the long-standing policy of the FCC "to treat ISP traffic as if it were local." FCC Ruling at ¶¶ 7, 23, 25.

E. The FCC's jurisdictional decision is not dispositive of the reciprocal compensation obligations of the parties.

GTE seeks to avoid its obligations by repeatedly relying on the FCC's conclusion that, for jurisdictional purposes, ISP-bound traffic does not "terminate" at the ISP. But the parties did not incorporate the FCC's jurisdictional analysis into the Agreement. Rather, they contracted within the context of standard industry usage in 1996. GTE's position notwithstanding, the clear intent of the parties – at the time the agreement was reached – was that carriers would receive compensation for ISP bound traffic.

F. Recent Court decisions confirm that industry practice at the time that the GTE/MFS contract was negotiated treated ISP-bound traffic as local traffic for compensation purposes.

In similar circumstances, the United States District Court for the Northern District of Illinois relied on industry practice to reject the same argument GTE makes here regarding "termination." See Illinois Bell Tel. Co. v. WorldCom Technologies, et al., No. 98 C 1925, 1998 WL 419493 (N.D. Ill. July 20, 1998) (Ex. 7). In that case, Ameritech claimed that ISP-bound traffic was jurisdictionally interstate under FCC

(continued)

agreement filed in Maryland between Bell Atlantic and Transwire Operations, LLC dated December 18, 1998, (attached as Exhibit 5) specifically excludes ISP-bound traffic from the reciprocal compensation provision. Indeed, in contracts where a CLEC is opting into an existing Interconnection Agreement with another carrier, Bell Atlantic, has added a 'clarification' that ISP-bound traffic is not local traffic eligible for reciprocal compensation. (Attached as Exhibit 6).

precedent because it did not terminate at the ISP. Like the interconnection agreements at issue here, local traffic in that case was defined by reference to termination. The court acknowledged the precedent on which Ameritech relied, but rejected Ameritech's claim that the precedent controlled the issue of the parties' intent.

Instead, the court affirmed the Illinois Commerce Commission's decision to define call termination by reference to "industry practice, in which call termination occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned and answer supervision is returned." Id., 1998 WL 419493, at *7. The court summarized the industry practice at the time of the agreements were executed:

> When a customer of a LEC dials the ISP's local, seven-digit number, the customer is connected to the ISP. Once this call connection is established between the caller and the telephone exchange service of the seven digit number, the call is deemed "terminated" for purposes of the Agreements.

Id., 1998 WL 419493, at *15. The court held that this industry "view of termination of the call leads to the conclusion that such calls are correctly classified as local calls under the Agreements." Id.

Other courts have expressly endorsed this analysis. Michigan Bell Tel. Co. v. MFS Intelenet, 16 F. Supp. 2d 828, 831-32 (W.D. Mich. 1998). The court's reasoning in Illinois Bell also applies here. As the FCC likewise recognized in the February 26 Ruling, the parties' agreement governs, not a subsequently announced new rule. That the FCC decided years after the Agreement was executed here that ISP-bound traffic does

not terminate at the ISP for jurisdictional purposes cannot alter the industry practice or the parties' intentions at the time of contracting.

III. State Commission Decisions Issued Subsequent To The FCC's February 26, 1999 Ruling Have Affirmed The Obligation To Pay Reciprocal Compensation On Calls To ISPs.

The issue raised by the Cox and Starpower Petitions has been the subject of fourteen (14) state regulatory commission rulings since the issuance of the FCC's February 26 Ruling. Thirteen (13) of these states have determined that reciprocal compensation payments are due on ISP-bound traffic since the issuance of the FCC's ISP Traffic Order.[5]

The Maryland Public Service Commission, for example, has directed Bell Atlantic to continue making reciprocal compensation payments under the MFS/Bell Atlantic Interconnection Agreement. Bell Atlantic had argued, like GTE does, that the FCC's February 26, 1999 Ruling relieved it of its contractual obligations. The Maryland Commission rejected this selective approach to reading the FCC's Order:

> If the finding that ISP-bound traffic is largely interstate was all that the FCC had decided, BA-MD's contention probably would be correct. However, the FCC also went on to state that this conclusion is not dispositive of interconnection disputes currently before state commissions.[6]

---

[5] The thirteen (13) states ruling in favor of continued reciprocal compensation payments since the FCC's ISP Traffic Order are Alabama, California, Delaware, Florida, Hawaii, Indiana, Maryland, Nevada, New York, North Carolina, Ohio, Oregon, and Washington. The anomalous Massachusetts Decision left the issue unresolved and directed the parties to negotiate an alternative compensation scheme.

[6] Case No. 8731, Order No. 75280 at 7 (Maryland PSC, June 11, 1999). (Attached as Exhibit 8).

The Maryland Commission then analyzed the various factors which the FCC had identified as relevant in construing Interconnection Agreements, and found that:

> Based on the foregoing, and recognizing the prevailing local treatment of ISP traffic at the time the agreement was executed, we conclude that the regulatory and industry custom at that time dictated that ISP traffic be treated as local, and therefore subject to reciprocal compensation. We find that the treatment of ISP traffic as local was so prevalent in the industry at that time that BA-MD, if it so intended, had an obligation to negate such local treatment in the interconnection agreements it entered into by specifically excluding ISP traffic from the definition of local traffic subject to the payment of reciprocal compensation. ... Given the circumstances then existing, we find the absence of such a specific exclusion or exception to be persuasive of the fact that BA-MD did not intend to exclude ISP traffic from the definition of local traffic when it entered the MFS agreement. Under all of the circumstances existing at the time the contract was entered into, we conclude that the parties contemplated reciprocal compensation payments for ISP traffic.[7]

Similarly, a recent decision of the Alabama Public Service Commission ("Alabama Commission") entered *after* the FCC issued the Ruling confirms that the reciprocal compensation payments are applicable to ISP traffic. See Order, In re Emergency Petitions of ICG Telecom Group, Inc. and ITC Deltacom Communications, Inc. for a Declaratory Ruling, Docket No. 26619 (Ala. Pub. Serv. Comm'n March 4, 1999). (A copy of the Alabama Commission's decision is attached as Ex. 9.) The Alabama Commission considered a parallel complaint brought by competitive carriers in

[7] Id. at 13-14.

Alabama against BellSouth, claiming that BellSouth violated its interconnection agreements by refusing to pay reciprocal compensation for calls to ISPs. The Alabama Commission considered whether the FCC's February 26 Ruling supported BellSouth's argument that reciprocal compensation does not apply to calls to ISPs because of their jurisdictional nature.

Relying on the factors listed by the FCC, the Alabama Commission analyzed the parties' agreements and found that the parties intended for calls to ISPs to be subject to reciprocal compensation. Relying on factors similar to those the Maryland Commission considered -- including the parties' practice of billing calls to ISPs as local calls -- the Alabama Commission concluded that calls to ISPs were subject to reciprocal compensation obligations under the agreements. (Id. at 24.)

The Alabama Commission focused on the parties' intentions at the time of contracting and noted that the overwhelmingly prevalent practice in the telecommunications industry has been to consider calls to ISPs to be local calls. (Id. at 24.) The Alabama Commission stated:

> In particular, we note that at the time the interconnection agreements in question were entered, ISP traffic was treated as local in virtually every respect by all industry participants including the FCC. Like the CLEC Petitioners/Intervenors, BellSouth was fully aware of the industry's prevailingly local treatment of ISP traffic at the time that it entered the interconnection agreements in question. In fact, BellSouth itself afforded ISP traffic prevailingly local treatment in the same respects that the CLECs did at that time.

(Id.) In fact, the Alabama Commission found that the industry treatment of calls to ISPs as local calls to be so prevalent that "BellSouth, if it so intended, had an obligation to negate such local treatment in the interconnection agreements it entered by specifically delineating that ISP traffic was not to be treated as local traffic subject to the payment of reciprocal compensation." (Id. at 25.)

The same factors discussed by the FCC and applied by the Alabama and Maryland Commissions lead to the conclusion that GTE and MFS agreed to include calls to ISPs in the Agreement's reciprocal compensation obligations.

Even if the aforementioned factors were not sufficient to demonstrate the parties' agreement to treat calls to ISPs as local -- and they are – the issuance of an Order directing that reciprocal compensation payments be made is well within the Commission's discretion recognized by the FCC. In the February 26, 1999 Ruling, the FCC noted that no existing FCC rule expressly provides for inter-carrier compensation for calls to ISPs. Id. at 25. Consistent with the existing regulatory policy, under which compensation for calls to ISPs is subject to state commission regulation, the FCC concluded that state commissions have discretionary authority to conclude that compensation is appropriate for the services carriers provide each other in completing calls to ISPs. Id. at 25-27.

An Order directing GTE to make reciprocal compensation payments is a valid exercise of the Commission's regulatory authority. Indeed, if the Commission does not so rule, the Petitioners will be forced to provide services to GTE to complete calls from GTE customers to Petitioners' ISP customers without any compensation.[8] That result

[8] When MFS terminates a call placed to an ISP by a GTE customer MFS is providing a service to GTE for which compensation should be provided. MFS facilities are used to provide this service and MFS

would be plainly inequitable.[9] The Maryland Commission noted its concern with this result and directed Bell Atlantic to pay reciprocal compensation to all carriers, including those interconnecting via the Statement of Generally Available Terms:

> We are very concerned that the adoption of BA-MD's position will result in CLECs receiving no compensation for terminating ISP-bound traffic. Such an effect will be detrimental to our efforts to encourage competition in Maryland. No one disputes that local exchange carriers incur costs to terminate the traffic of other carriers over their network. In the absence of finding that reciprocal compensation applies, a class of calls (ISP traffic) will exist for which there is no compensation.[10]

The Commission should avoid this inequitable result and direct GTE to honor its contractual obligations.

CONCLUSION

The Commission has made MFS a party to the Starpower Petition because Starpower has opted-in to the MFS/GTE Interconnection Agreement. That Agreement clearly contemplates the treatment of ISP-bound traffic as local traffic subject to the payment of reciprocal compensation. The FCC's Order specifically affirms prior state commission decisions on this issue, and in giving guidance to states that had not yet

---

(continued)

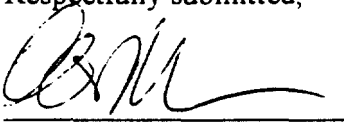
incurs costs when providing this service. GTE's position suggests that this service be provided free of charge. The better course is to continue the compensation previously ordered by this Commission. As noted above, nothing in the FCC's ruling requires MFS to provide this service free of charge.

[9] The FCC itself recognized that competitive carriers incur costs in delivering ISP-bound calls, for which they should be compensated. FCC Ruling at 29.

[10] Case No. 8731, Order No. 75280 at 17 (Maryland PSC, June 11, 1999).

reached the issue, the FCC issued guidelines that compel the conclusion that reciprocal compensation must be paid on ISP traffic. Accordingly, the Commission should direct GTE to make such payments pursuant to the terms of its Interconnection Agreement with MFS.

Respectfully submitted,



Counsel for MCI WorldCom, Inc.

Eric M. Page, Esquire
Robert A. Omberg, Esquire
LeClair Ryan, A Professional Corporation
4201 Dominion Boulevard, Suite 200
Glen Allen, Virginia 23060
Tel (804) 968-2985
Fax (804) 270-4715

Allen M. Freifeld, Esquire
Regional Counsel
MCI WorldCom, Inc.
1133 19th Street, NW
Washington, D.C. 20036
Tel (202) 736-6104
Fax (202) 736-6615

Dated: July 19, 1999

CERTIFICATE

I hereby certify that a true copy of the foregoing was hand-delivered or mailed, postage prepaid, to: Russell M. Blau, Esquire, and Michael L. Shor, Esquire, Swidler, Berlin, Shereff, Friedmann, 3000 K Street, N.W., Suite 300, Washington, D.C. 20007; to Louis R. Monacell, Esquire, and Robert M. Gillespie, Esquire, Christian & Barton, L.L.P. 909 East Main Street, Suite 1200, Richmond, Virginia 23219; to Stephen C. Spencer, Regional Director-External Affairs, GTE South Incorporated, Three James Center, Suite 1200, 1051 East Cary Street, Richmond, Virginia 23219; to Richard D. Gary, Esquire, Hunton & Williams, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, Virginia 23219; to John F. Dudley, Esquire, Senior Assistant Attorney General, Division of Consumer Counsel, Office of Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219; and to William H. Chambliss, Esquire, Deputy General Counsel, State Corporation Commission, Tyler Building, 1300 East Main Street, Richmond, Virginia 23219, on this 19th day of July, 1999.

Eric M. Page